See Teow Chuan & Anor v Dato' Anthony See Teow Guan

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-23-06 OF 1997
JAMES FOONG J
16 APRIL 1999

Evidence *— Privilege — Legal professional privilege — Legal opinion prepared by solicitors — Allegation that defendant provided solicitors with defamatory information — Whether solicitor who drew legal opinion was entitled to claim privilege — Consent of client to dictate communication — Document already in possession of opposite party — Whether exempted from privilege — Whether communication intended to be confidential — Whether was in furtherance of illegal purpose — Plaintiffs given legal opinion, whether privilege removed — Evidence Act 1950 s 126*

The plaintiffs' claim against the defendant is for defamation on a legal opinion dated 14 November 1996 ('the legal opinion') issued by a firm of solicitors, M/s Shearn Delamore & Co ('the solicitors'). The plaintiffs have alleged that the defendant had falsely and maliciously provided the solicitors defamatory information to formulate the legal opinion. It is claimed that the defendant was responsible for the publication of this legal opinion to various people.The first witness to be called by the plaintiffs — Ms Jeyanthini, the senior legal assistant who took instructions from the defendant and drew up the legal opinion — was asked questions which she responded that she was unable to answer because of legal professional privilege. The defence counsel objected to the admissibility of conversation between the solicitors and client and the legal opinion on the basis s 126 of the Evidence Act 1950 ('the Act').

The court ordered a trial within a trial to determine its admissibility. Counsel for the plaintiffs, inter alia, argued that: (i) consent of the client to dictate this communication and document could have been endorsed in the document itself, or given separately in writing; (ii) a document already in possession of the opposite party and contained in the documents filed in court is exempted from a claim of legal professional privilege; (iii) the communication by the defendant and the solicitors was not intended to be confidential; (iv) the plaintiffs alleged that there was furtherance of an illegal purpose and proviso (a) of s 126 of the Act applies; and (v) since the plaintiffs were given the legal opinion because they have an interest therein, such privilege is removed.

Held:

(1) The ruling in *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 is that the 'express consent' set out in s 126 of the Act must be in writing. The evidence obtained from a trial within a trial reveals no such consent. Disclosures to the officers of the company cannot be considered a consent by the company to disclose it to the world at large (see p 46F–H).

(2) The view that a privilege cannot be claimed in respect of a document which has already come in possession of the opposite party and has filed on record can be exceedingly dangerous. To allow this to be admitted, when neither client nor solicitor consented to its disclosure, would make the provision of s 126 of the Act completely vulnerable and ineffective (see p 47D–F); *Daya Shanker Dubey v Subhas Kumar* [1992] Cri LJ 319 not followed; *Derby & Co Ltd & Ors v Weldon & Ors (No 10)* [1991] 2 All ER 908 distingushed.

(3) There is no express requirement in s 126 of the Act that the element of confidentiality must be attached to this privilege (see p 48C). There was no furtherance of an illegal purpose from the evidence of the witnesses called by the plaintiffs (see p 48D–E).

(4) Once privileged, it will always be privilege. It does not matter whether the subject matter concerns the plaintiffs or they obtained it from whom. But as far as PW1 is concerned, she does not need to disclose the instruction given to her by the defendant or tender the legal opinion she prepared on ground of legal professional privilege (see p 48F–G).

[Bahasa Malaysia summary

Tuntutan plainif-plaintif terhadap defendan adalah berhubung dengan fitnah ke atas suatu pendapat undang-undang bertarikh 14 November 1996 ('pendapat undang-undang tersebut') yang dikeluarkan oleh sebuah firma guaman, Tetuan Shearn Delamore & Co ('peguamcara-peguamcara tersebut'). Plaintif-plaintif telah mendakwa bahawa defendan telah secara palsu dan niat jahat membekalkan peguamcara-peguamcara tersebut dengan maklumat fitnah untuk membentuk pendapat undang-undang tersebut. Adalah dituntut bahawa defendan bertanggungjawab terhadap penerbitan pendapat undang-undang tersebut kepada pelbagai orang. Saksi pertama yang telah dipanggil oleh plaintif-plaintif — Cik Jeyanthini, pembantu kanan undang-undang yang telah mengambil arahan daripada defendan dan membentuk pendapat undang-undang tersebut — telah ditanyakan soalan-soalan di mana beliau telah menjawab bahawa beliau tidak dapat menjawab oleh sebab keistimewaan profesional undang-undang. Peguam pembela membangkang terhadap kebolehterimaan percakapan antara peguamcara-peguamcara tersebut dan anakguam dan pendapat undang-undang tersebut berdasarkan s 126 Akta Keterangan 1950 ('Akta tersebut').

Mahkamah telah memerintahkan suatu perbicaraan diadakan untuk menentukan kebolehterimaannya. Peguam bagi pihak plaintif-plaintif, antara lain, menghujahkan bahawa: (i) kebenaran anakguam untuk membenarkan perhubungan dan dokumen boleh diindorskan di dalam dokumen itu sendiri, atau diberi berasingan

secara bertulis; (ii) suatu dokumen yang telahpun berada di dalam pemilikan pihak yang berlawanan dan terkandung di dalam dokumen-dokumen yang telah difailkan di mahkamah adalah dikecualikan daripada tuntutan terhadap keistimewaan profesional undang-undang; (iii) perhubungan oleh defendan dan peguamcara-peguamcara tersebut bukan bermaksud untuk dijadikan rahsia; (iv) plaintif-plaintif mendakwa bahawa terdapat perlanjutan suatu tujuan yang tidak sah dan proviso (a) s 126 Akta tersebut adalah terpakai; dan (v) memandangkan plaintif-plaintif telah diberikan pendapat undang-undang tersebut kerana mereka mempunyai kepentingan di dalamnya, maka keistimewaan sedemikian telah disingkirkan.

Diputuskan:

(1) Keputusan di dalam kes *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 adalah bahawa 'kebenaran nyata' diperuntukkan di dalam s 126 Akta tersebut mestilah secara bertulis. Keterangan yang diperolehi daripada perbicaraan di dalam perbicaraan memperlihatkan tiada sebarang kebenaran. Pendedahan kepada pegawai-pegawai syarikat tersebut tidak boleh dianggap sebagai suatu kebenaran oleh syarikat tersebut untuk mendedahkannya ke mata dunia keseluruhannya (lihat ms 46F–H).

(2) Pandangan bahawa suatu keistimewaan tidak boleh dituntut berhubung dengan dokumen yang telah dimiliki oleh pihak yang berlawanan dan telah difailkan atas rekod boleh dianggap sebagai amat merbahaya. Dengan membenarkan ia diterima, apabila anakguam dan peguamcara tidak membenarkan pendedahan tersebut, akan menyebabkan peruntukan s 126 Akta tersebut keseluruhannya terjejas dan tidak berkesan (lihat ms 47D–F) *Daya Shanker Dubey v Subhas Kumar* [1992] Cri LJ 319 tidak diikut; *Derby & Co Ltd & Ors v Weldon & Ors (No 10)* [1991] 2 All ER 908 dibeza.

(3) Tiada keperluan nyata di dalam s 126 Akta tersebut bahawa elemen kerahsiaan mesti dikaitkan dengan keistimewaan (lihat ms 48C). Selanjutnya, tiada tujuan yang tidak sah daripada keterangan saksi-saksi yang telah dipanggil oleh plaintif-plaintif (lihat ms 48D–E).

(4) Selagi telah diberi keistimewaan, ia akan sentiasa dilindungi. Ia tidak kira sama ada perkara utama melibatkan plaintif-plaintif atau daripada siapa mereka memperolehinya. Namun begitu, setakat SP1 berkenaan, beliau tidak perlu mendedahkan arahan yang telah diberi kepadanya oleh defendan atau mengemukakan pendapat undang-undang tersebut yang telah disediakan oleh beliau atas alasan keistimewaan profesional undang-undang (lihat ms 48F–G).]

Notes

For cases on legal professional privilege, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1376–1400.

Cases referred to

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445 (refd)

Daya Shanker Dubey v Subhas Kumar [1992] Cri LJ 319 (not folld)

Derby & Co Ltd & Ors v Weldon & Ors (No 10) [1991] 2 All ER 908 (distd)

Emperor v Mariane G Rodrigues (1903) 5 Bom LR 122 (refd)

Legislation referred to

Evidence Act 1950 ss 126, 127

VK Lingam (*Peter Raj* with him) (*VK Lingam & Co*) for the plaintiff.

Romesh Abraham (*CM Teng* with him) (*Shook Lin & Bok*) for the defendant.

James Foong J: The plaintiffs' claim against the defendant is for defamation on a legal opinion dated 14 November 1996 ('the legal opinion') issued by a firm of solicitors, M/s Shearn Delamore & Co ('the solicitors') acting for a public listed company known as Kian Joo Can Factory Bhd ('KJCF'). The plaintiffs have alleged that the defendant had falsely and maliciously provided the said solicitors orally, or in writing certain defamatory information and upon these the legal opinion was formulated. It is then claimed that the defendant was responsible for the publication of this legal opinion to various people.

The first witness to be called by the plaintiffs was one Ms Jeyanthini, the then senior legal assistant of the said solicitors who took instructions from the defendant and drew up legal opinion. She was asked the following pertinent questions which were responded with the respective answers.

Q1: Why did they (the defendant) come to see you?

A: I am unable to answer because of legal professional privilege.

Q2: Do you have a copy of the legal opinion to produce in this court?

A: I am unable to answer because of legal professional privilege.

On these, Mr Romesh, counsel for the defendant, also rose to object to the admissibility of both the conversation between the said solicitors and client and the legal opinion. His ground is: s 126 of the Evidence Act 1950 ('the Act').

Encountered with this, I ordered a trial-within-a trial to determine on the admissibility of the aforesaid. The following is my judgment of the trial-within-a trial.

Section 126 of the Evidence Act 1950 provides: A

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course of and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has became acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment. B

Provided that nothing in this section shall protect from disclosure —

(a) any such communication made in furtherance of any illegal purpose; C

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client. D

Dato' Lingam, counsel for the plaintiffs, advanced six grounds in his submission to overcome s 126 of the Act.

The first is that this privilege is not absolute.

I am in full agreement with him on this. It could be waived by the consent of the client, and exempted if: it is in furtherance of any illegal E purpose, or that showing any crime or fraud has been committed.

The second ground is that the 'consent' of the client to dictate this communication and document 'could have been endorsed in the document itself, or given separately in writing to the effect that they (the client) consented to the document being released ...' — a phrase borrowed from F Eusoff Chin J (as he then was) in *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445.

It must be firstly pointed out that the ruling in *Dato' Au Ba Chi*'s case, is that the 'express consent' set out in s 126 of the Act must be in writing. It is based on this that the learned judge made the above observation G according to the circumstances of the case. In our present situation, the evidence obtained from a trial-within-a trial reveals no such consent from KJCF. Though the defendant, when he received the legal opinion by fax, minuted thereon 'Alice (the group financial officer) and Tunku (the chairman of the audit committee)', it does not amount to an express written consent by KJCF to disclose this communication and document. These are H officers of the company itself and disclosure to them cannot be considered a consent by the company to disclose it to the world at large.

The third ground raised is based on a claim that a document already in possession of the opposite party and contained in the documents filed in court is exempted from a claim of legal professional privilege. Here Dato' I Lingam cited two authorities: *Daya Shanker Dubey v Subhas Kumar* [1992] Cri LJ 319 at p 323 and *Derby & Co Ltd & Ors v Weldon & Ors (No 10)* [1991] 2 All ER 908 at p 917.

A I have the opportunity of perusing these two cases, which I find them to be distinguishable; and do not set out any universal accepted principle except to accommodate the particular circumstances of the cases. In the Indian case of *Daya Shanker Dubey*, it involves a petition for contempt against the respondent in failing to obey certain order. One of the grounds was that the respondent's counsel had, at one time, given an opinion to the B Magistrate of Allahabad that the order passed by the court on 11 January 1991 was interpreted to mean that the panel lawyer which the petitioner was a member should be allowed to carry out some legal work on revenue matters for a certain district in Allahabad. Since the magistrate had ignored the advice of the respondent's counsel and failed to give work to the petitioner, the petitioner claimed that this aggravated the disobedience of C the order. The respondent's counsel claimed that this opinion he once gave was a privileged communication between advocate and client, and the petitioner cannot make use of it. Justice NN Mithal rejected this. Firstly on the ground that 'the privilege can be claimed only when the advocate or the client are asked to disclose any professional communication between them.' D This I am in full agreement. But in our present case, PW1 was asked this very question, and she, in my opinion has every right to claim such privilege, and indeed she did.

The second ground of Justice NN Mithal judgment however, I take exception. He expressed that 'such a privilege, however, cannot be claimed in respect of a document which has already come in possession of the E opposite party and has filed on record.' Such view, if of general application, can be exceedingly dangerous. Imagine a situation where the plaintiff had obtained a document by devious means and exhibit it in his affidavit when, on such document, professional privilege is claimed. To allow this to be admitted, when neither client nor solicitor consented to its disclosure, would make the provision of s 126 of the Act completely vulnerable and F ineffective. In our present set of circumstances, PW1 has clearly claimed the privilege against disclosure, and there is no evidence in the trial-within-the trial that her client (KJCF) have given their consent for such release; then I cannot see how such document can be admitted through this witness.

As for the case of *Derby & Co Ltd*, the privilege claimed is firstly not G legal professional privilege. Secondly, the circumstances of that case involves a whole series of cases where the judge felt that the conversation between the client and their investigators had already been brought to issue in a major action on which basically the parent company of the plaintiffs against the defendants for unauthorised advances by the defendants then in control of one of the companies which the plaintiffs' parent company H subsequently took over, thereby guilty of dishonesty or breach of fiduciary duty. The only passage, I think, the plaintiffs' counsel relied on is at p 917f of the report where Justice Vinelott suggested:

> The point can be tested in this way. Suppose that Mr Comer or Mr Price had exhibited a transcript of the tape to an affidavit in support of their claims as to I the extent of the knowledge of the plaintiffs and the ambit of Network's retainer. Would the plaintiffs then have been entitled to claim privilege? It seems to me that the answer to that question is No. If that is right, the plaintiffs cannot claim privilege now.

This answer may be appropriate in the factual matrix of the case, but it does not involve, as I stressed earlier, legal professional privilege — which is set out under our statutory provision of s 127 of the Act. If such question in our present factual situation is asked, my answer must be: Yes. The client has every right to object since the opening phrase of this particular section reads: 'No advocate shall be permitted ...'. Thus unless express consent in writing by client is given to PW1 the legal opinion cannot be disclosed through her.

The fourth ground advanced is that the communication by the defendant and the said solicitors was not intended to be confidential.

Here I am in full agreement with the defendant's counsel's argument that firstly there is no express requirement in s 126 of the Act that the element of confidentiality must be attached to this privilege. Even if one reads into this such a requirement, in the light of the Indian authority of *Emperor v Mariane G Rodrigues* (1903) 5 Bom LR 122, I find, no evidence that the communication and the document so made between the said solicitors and their client was made merely as a matter of fact and under no condition of secrecy. The evidence point to great confidentiality and the need of secrecy according to the facts as exposed.

On this fifth point, the plaintiffs alleged that there was furtherance of an illegal purpose, thereby the proviso (a) of s 126 of the Act applies.

I fail to detect the furtherance of an illegal purpose from the evidence of the witnesses called by the plaintiffs. On the contrary most of them testified that there was no such illegal purpose in obtaining the legal opinion. There were irregularities, alleged to be committed by the plaintiffs on the company (KJCF), and the legal opinion was sought to request the plaintiffs to clarify and explain. Though this may be a strange way of proceeding with it, but yet I cannot come to a conclusion that this can amount to an illegal purpose.

On the last point, Dato' Lingam submitted that since the plaintiffs were given the legal opinion because they have an interest therein, such privilege is removed. I cannot accept this contention for 'once privileged it will always privilege' — see *Dato' Au Ba Chi*'s case. It does not matter whether the subject matter concerns the plaintiffs or they obtained it from whom. But as far as PW1 is concerned, she does not need to disclose the instruction given to her by the defendant or tender the legal opinion she prepared on ground of legal professional privilege.

Based on the aforesaid, I hereby rule that PW1 cannot be compelled to disclose the communication she had with the defendant and the production of the legal opinion.

Order accordingly.

Reported by Benjamin Yong